92-1714

No. _____

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THOMAS L. BLACKBURN

Petitioner

vs.

REBECCA L. TUDOR

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

THOMAS L. BLACKBURN
2701 Argonne Rd
P.O. Box 1463
Portsmouth, Ohio 45662
Pro se

QUESTIONS PRESENTED

I

Is a plaintiff deprived of due process of law, within the meaning of the Fourteenth Amendment to the U.S. Constitution, where Ohio law does not provide a legal remedy, for breach of promise to marry, but the laws of other States provide such a remedy; if so, did the Supreme Court of Ohio deny plaintiff due process of law or equal protection of the laws, when it refused to overturn a decision rendered by the Court of Appeals for the Fourth District Court of Appeals?

II

Does the Order of the Supreme Court of Ohio, denying plaintiff-appellant's motion to certify the record to that Court deny plaintiff-petitioner due process of law, within the meaning of the Fourteenth Amendment to the U.S. Constitution?

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Petitioner, Thomas L. Blackburn, seeks review of an Order of the Supreme Court of Ohio, said order appearing to adopt the decision of the Court of Appeals for the Fourth Appellate District of Ohio. The case originated in the Scioto County Court of Common Pleas. In that Court, petitioner filed a complaint alleging that he had been wrongfully deprived of his real property, by respondent.

OPINIONS BELOW

Petitioner timely perfected an appeal to the Court of Appeals for the Fourth Appellate District of Ohio. The Appellate Court, on September 25, 1992, ruled that the trial judge had allowed improper evidence to be introduced into the case. It vacated the judgment, and remanded the case to the trial court with instructions for the trial judge to consider the case without the improper evidence. See Appendix at pages 1A through 36A.

Petitioner timely perfected an appeal to the Supreme Court of Ohio, seeking an order from that Court to certify the record of the Court of Appeals to the Supreme Court of Ohio. See Appendix at pages 37A through 39A. In accordance with the Rules of the Supreme Court of Ohio, petitioner timely filed his Brief in Support of Jurisdiction. See Appendix at Pages 40A through 49A. This motion was overruled[1]. Appendix at page 60A. Petitioner timely moved the Supreme Court of Ohio to reconsider the matter. See Appendix at pages 64A - 68A. This

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[1] On October 16, 1992, the trial judge entered a "Revised Judgment Entry", reinstating his original decision. This entry was made before the time to appeal to the Supreme Court of Ohio had expired. As a result, petitioner moved the Supreme Court of Ohio to stay enforcement of this Judgment Entry. This motion was denied. A copy of the Order appears in the Appendix hereof, at page 54A. A reproduction of the motion appears in the Appendix at pages 55A through 59A. A reproduction of the Trial Judge's Revised Judgment appears in the Appendix at pages 51A through 53A.

motion was also overruled. See Appendix at page 69A.

JURISDICTION

The Supreme Court of Ohio, the court of last resort in the State of Ohio, has ruled on this matter. Authority for this review is found at Rule 10.1(b) of the Rules of the Supreme Court and at 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, of the United States Constitution, as applied to the States, respecting due process and equal protection under the law.

STATEMENT OF THE CASE

The parties were engaged to be married. Respondent, for no good cause, terminated the engagement. While engaged, petitioner purchased real property, to be given to respondent when they married. A deed was prepared conveying this property

to respondent and placed with an escrow agent, not to be released to respondent unless certain conditions transpired. None of the conditions under which the escrow agent was to release the deed to respondent occurred. After terminating the engagment, respondent surreptitiously obtained possession of the deed and recorded it. When petitioner discovered this, he filed an action in the Scioto County Court of Common Pleas. The action came on for trial. Judgment was rendered favoring respondent. Petitioner appealed to the Court of Appeals for the Fourth Appellate District. On October 16, 1992, the trial judge entered a "Revised Judgment Entry", reinstating his original decision. A copy of the judgment appears in the appendix hereof. Notwithstanding the trial court's entry, petitioner timely perfected an appeal to the Supreme Court of Ohio, pursuant to the rules. The

Supreme Court of Ohio declined to order that the record be certified to that Court and denied rehearing. A motion to stay enforcement of the judgment was also denied by the Supreme Court of Ohio.

REASONS TO GRANT THE PETITION FOR A WRIT

In effect, the Ohio Courts have allowed respondent to obtain a windfall of significant proportions. In its opinion and decision, the Court of Appeals for the Fourth Appellate District found that petitioner was not in the chain of title relating to the subject property. Citing cases cited in 13 American Jurisprudence 2d (1964), 537, Cancellation of Instruments, Section 54, the appellate further found that, while other states have recognized the right of a person outside the chain of title to maintain a legal action against one to whom a transfer of real property has occurred, Ohio recognizes no such right. Petitioner's sole course of action, the Appellate opined, was

equitable relief. Since, inter alia, petitioner was married at the time he became engaged to respondent, the trial court concluded that he had dirty hands, and could not rely on equity for relief. Had petitioner been able to maintain a legal action, the doctrine of clean hands would not have obtained.

Such a harsh result is a proper subject for review in this Court, pursuant to rule 10.1(b) of the Rules of the Supreme Court or 28 USC 1257.

Secondly, under existing Ohio law, only tangible items transferred in contemplation of marriage may be recovered by a legal action, when the engagement is wrongfully terminated. When the property sought to be recovered is real property and there has been a transfer of ownership, questions arise as to whether the complaining party's remedy exists at all or is in equity. See, generally, Strock

V. Presnell, 38 O.S.3d 207, 527 N.E. 2d 1235 (1988) and Slusher v. Oeder, 16 O.App.3d 432, 476 N.E.2d 714, 16 OBR 503 (1984). See also the concurring opinion of Stephenson, P.J. in the Appendix. If real property is involved, therefore, the complaining party is at a distinct disadvantage under the law, that person would be, if personally involved. A review pursuant to either Rule 10.1(b) of the Rules of the Supreme Court or 28 USC 1257 is appropriate.

The Supreme Court of Ohio, without opinion, denied petitioner's jurisictional motion, letting stand the Court of Appeals decision.

CONCLUSION

Petitioner prays that this Court will overturn the Order of the Supreme Court of Ohio, remand this case to the trial court with instructions that clarify the law in

Ohio, as it relates to recovery of real property, under the circumstances such as are demonstrated in this case. In the alternative, petitioner prays that this Court direct that he be granted a new trial.

Respectfully submitted,

Thomas L. Blackburn

THOMAS L. BLACKBURN, Pro se

CERTIFICATE OF SERVICE

This is to certify that on 23rd day of April, 1993, three true and correct copies of the foregoing Petition for a Writ of Certiorari were mailed, postage prepaid to:

Mr. Stanley C. Bender
Attorney for Respondent
P.O. Box 950
Portsmouth, Ohio 45662
Telephone: 614-354-4200

Notice was also provided to the Clerk of The Supreme Court of Ohio, and that the number of copies required by the Rules of the Supreme Court were mailed to the Clerk of the U.S. Supreme Court, at Washington, D.C.

Thomas L. Blackburn

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Portsmouth, Ohio 45662
Telephone: 614-354-4732

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

FOURTH APPELLATE DISTRICT

SCIOTO COUNTY

Thomas L. Blackburn Plaintiff-Appellant

vs.

Rebecca L. Tudor Defendant-Appellee

Case No. 2021

DECISION AND JUDGMENT ENTRY

APPEARANCES:

Gerlach, Gerlach, and Gerlach, Ms. Cynthia Koehler Gerlach, Portsmouth, Ohio, for Appellant.

McCurdy, Johnson, Ruggiero, McKenzie & Bender, Mr. Stanley C. Bender, Portsmouth, Ohio, for Appellee.

Harsha, J.:

Thomas L. Blackburn, plaintiff-appellant, appeals from a judgment entered by the Scioto County Court of Common Pleas finding in favor of Rebecca L. Tudor,

defendant-appellee, on Blackburn's complaint which requested that the purported delivery of a deed to certain property to Tudor be declared invalid and that the filing of the deed and the conveyance represented by the deed be set aside and canceled.

Appellant assigns the following errors:

I. THE TRIAL COURT ERRED IN ITS FINDINGS OF FACT WHICH ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT SHOULD HAVE GRANTED JUDGMENT TO PLAINTIFF-APPELLANT IN ACCORDANCE WITH EQUITY.

III. THE TRIAL COURT ERRED IN PERMITTING VIOLET COX-FAIN TO TESTIFY REGARDING PRIVILEGED COMMUNICATIONS WITH PLAINTIFF-APPELLANT.

IV. THE TRIAL COURT ERRED IN FAILING TO ALLOW APPELLANT TO AMEND HIS COMPLAINT.

On April 8, 1991, appellant filed a

complaint which averred the following. On October 20, 1989, appellant purchased real and personal property from Ronald and Phyllis Lauder who upon appellant's direction executed a deed to appellee, as grantee, for the real property. On July 12, 1990, appellant delivered this deed to Claude Springer as escrow agent with instructions that the deed would be delivered to appellee only if appellant should die or not get divorced by July 12, 1991. Appellee, in a manner unknown to appellant, obtained possession of the deed and had it recorded on January 28, 1991. Appellant's complaint asserted that he had no adequate legal remedy and that he should obtain equitable relief declaring the delivery of the deed to appellee invalid and setting aside the conveyance of real property to appellee. Appellee subsequently filed an answer which contended, in part, that appellant was

"estopped from seeking equitable relief because he has attempted to defraud both defendant and the court."

Two trial court judges recused themselves upon motions of appellant. Appellant's second recusal motion explicitly requested that the case be heard by the same judge who had presided over appellant's divorce case in Case No. 90-DR-306 in part, because that judge was familiar with the "property issue." The case was then so assigned.

A bench trial was subsequently held upon appellant's complaint for equitable relief, and the following, pertinent evidence was adduced. Appellant owns and operates T.L. Blackburn Construction Company. He was married to Carolyn Blackburn. In July of 1987, he engaged in an extramarital affair with appellee. In 1988, appellant left his wife and moved into an apartment he owned in Portsmouth

while he continued his relationship with appellee. In September 1989, appellee ended her relationship with appellant because he had not yet divorced his wife. According to appellee, appellant promised to buy her a house, a car, an engagement ring, and a wedding ring if she resumed their relationship. Appellant testified that he only promised appellee these things if and when they got married. Violet Cox-Fain, a licensed independent social worker and a licensed professional counselor, testified that she conducted joint counseling sessions with appellant and appellee in late September and early October of 1989 and that during these meetings, appellant told appellee that if she would continue their relationship, he would purchase her a house and a car.

On October 2, 1989, appellant purchased an engagement ring and a wedding ring and gave them to appellee.

Thereafter, appellee and her mother advised him that they had found a house located at 5270 Oakland Boulevard, Sciotoville, Ohio. Appellant paid for a title search and a survey of the property, and on October 19, 1989, he borrowed $90,000 from a bank in Portsmouth. On October 20, 1989, he went to Ironton, Ohio, and had an attorney prepare a deed to the real property from Ronald and Phyllis Lauder to appellee. The purchase price was $82,000. Appellant then had his secretary, Glenda Willis, prepare a second deed which listed himself as grantee. The deeds were executed by Ronald and Phyllis Lauder in South Point, Ohio, at a closing which appellant arranged and attended. Appellee was not present at the closing.

Appellant then gave the original deeds to his secretary with instructions not to release the deeds to anyone but him. On October 21, 1989, appellant gave

appellee the keys to the house and she and appellant moved in. The utilities were all placed in appellee's name. On November 2, 1989, appellant filed for a divorce from his wife. In December of 1989, appellant leased a GEO Tracker automobile and gave it to appellee to use. The parties' relationship became strained because appellee was constantly asking that appellant record the deed or give her the deed. Appellee was unaware of appellant's other deed which listed himself as grantee.

In April, 1990, the parties had a fight and appellant voluntarily moved out of the subject property. Marilyn Springer, appellee's mother, then moved in with appellee at the Sciotoville property. Appellant moved back to his marital domicile and attempted a reconciliation with his wife. On April 27, 1990, appellant dismissed his previously filed

divorce complaint. When the reconciliation failed, appellant moved back to his Portsmouth apartment and attempted to resume his relationship with appellee. On June 19, 1990, appellant filed a second divorce complaint.

According to appellant's testimony, appellee told him that if he gave the deed to the property with appellee's name as grantee to appellee's stepfather, Claude Springer, to hold for him, then appellant could move back in with appellee and try to work things out. On July 11 or 12, 1990, appellant took the original deed naming appellee as grantee from his secretary and gave it to Claude Springer to hold for appellant's benefit. Both appellant and Claude Springer testified that the deed was only to be transferred to appellee or recorded if: (1) appellant was not divorced by July 12, 1991 or (2) appellant died.

Neither of these conditions occurred. Appellant moved back into the Sciotoville property with appellee and her mother.

On October 29, 1990, his wife's divorce attorney took appellant's deposition in the context of the divorce proceeding. A pretrial statement listed the Sciotoville property as an asset purchased in October of 1989, and that it was to be appellant's "future home." When questioned about the property by his wife's attorney, appellant testified he had no ownership interest in the property, that he had purchased it for appellee, and that the deed was made out to appellee. Appellant did not state in the deposition that he had directed the execution of another deed to the property in his own name. Appellant testified at trial in the case at bar that he had the deed to appellee drafted in Ironton because he did not want his wife to know about it and

that if he went bankrupt, there was a "possibility" that he might want to keep the bankruptcy court from finding out about it. Conversely, appellant further testified that he told his wife prior to the divorce trial about the two deeds and the Sciotoville property and that he never anticipated and never, in fact, filed for bankruptcy.

In January of 1991, the parties again had a physical fight, and, once again, appellant voluntarily moved out of the Sciotoville property. Without either appellant or Claude Springer's knowledge or consent Marilyn Springer took the deed naming appellee as grantee of the Sciotoville property from Claude Springer's safe and gave it to appellee, who caused the deed to be filed on January 28, 1991. Appellant lost the deed made out to himself as grantee, and, consequently, never filed it. Appellee

testified that appellant gave her the deed for a brief period on February 15, 1990, but he took it back shortly thereafter. Appellee admitted that she ultimately got the deed when her mother took the deed from the safe in which Claude Springer had placed it.

On November 15, 1991, the trial court entered a judgment in appellee's favor on the basis that appellant had no legal cause of action and did not come to court with clean hands so as to entitle him to equitable relief. Appellant subsequently filed a motion for new trial with an attached affidavit of his ex-wife stating that she knew as early as April of 1990 about appellee's purchase of the Sciotoville property. The trial court overruled appellant's motion on December 4, 1991.

Appellant's first assignment of error asserts that the trial court's findings of

fact in denying his claim for equitable relief were against the manifest weight of the evidence. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. State, ex rel. Pizza, v. Strope (1990), 54 Ohio St. 3d 41, 46; see, also Eberly v. A-P Controls,Inc. (1991), 61 Ohio St. 3d 27, 30.

In the trial court's journal entry of November 15, 1991, it specifically listed under it heading "FACTS" the following:

> * * * He surreptitiously purchased the house in question in this case and put the deed in defendant Tudor's name. His divorce was then pending and he did not want this property considered as a marital assets. In fact, during the divorce hearing, under oath, he denied any ownership

or interest in the property, and in fact, the asset was not considered by the Judge in dividing the marital property. (That Judge, incidentally, was the same Judge as the Judge in this case).

(Emphasis added.)

Appellant specifically contends on appeal that the foregoing finding of fact, i.e., what occurred at this divorce trial, was unsupported by evidence in the case at bar. On May 22, 1991, the trial court in the divorce case sealed the record on appellant's motion based on appellant's representation that it would affect his financial condition and his business if his competitors obtained information contained in the divorce proceedings. On May 29, 1991, appellee filed a mistitled "MOTION IN LIMINE" which actually sought court approval to utilize appellant's

pretrial deposition in the divorce trial to "show that Blackburn previously denied, under oath, ownership of the property he now claims to own." At trial in the instant case, the trial court granted appellee's motion and allowed utilization of evidence from the divorce proceedings regarding the Sciotoville property, and further stated as follows:

> * * * Actually it just so happens that you have the same Judge now as you had in that action. And I couldn't divorce that particular testimony from my mind anyway. If you know what I mean. And if it has any relevance in this case I'll so consider it. * * *

During the trial, although appellant testified on cross examination about answers he gave during a pretrial deposition in the divorce case, there was no evidence that such deposition was

subsequently introduced into evidence at the divorce trial or that appellant testified at the divorce trial that he had no ownership or interest in the Sciotoville property. Therefore, it is apparent that the trial court, in effect, took judicial notice of the prior divorce proceeding which it had presided over.

However, the rule is well established in Ohio that trial courts may not take judicial notice of their own proceedings in other cases, even though the same trial judge may have presided. Myers v. State (1889), 46 Ohio St. 473; State, ex rel. Crow, v. Weygandt (1959), 170 Ohio St. 81; In the matter of Pyle (May 6, 1992), Belmont App. No. 91-B-27, unreported; Kerns v. Mansfield (Dec. 15, 1989), Logan App. No. 8-87-20, unreported. Therefore, a trial court may not take judicial notice of prior proceedings in the court, but may only take judicial notice of prior

proceedings in the immediate case. Diversified Mortgage Investors, Inc. v. Bd. of Revision (1982), 7 Ohio App. 3d 157; see State v. Bialek (Feb. 17, 1992), Montgomery App. No. 12323, unreported, where the appellate court noted that adoption of Evid. R. 201 has not modified the foregoing precedent. The rationale for these holdings is that when judicial notice is taken of prior proceedings, such prior proceedings are not part of the record as defined in App. R. 9, and whether the trial court correctly interpreted such prior proceedings is not reviewable by the appellate court. Accord v. Accord (April 22, 1981), Pike App. No. 329, unreported.

Based on the foregoing, the trial court's findings of fact relating to the "divorce hearing" and its divorce decree were not supported by competent, credible evidence and, consequently, were against

the manifest weight of the evidence. Nevertheless, in order to support a reversal of a judgment, the record must show affirmatively not only that error intervened, but that such error was to the prejudice of the party seeking such reversal. Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co. (1986), 26 Ohio St. 3d 15, 18; Lowry v. Lowry (1988), 48 Ohio App. 3d 184, 190. The "harmless error" rule of Civ. R. 61 requires courts to disregard errors which do not affect the substantial rights of the parties. Rouse v. Rouse (July 8, 1991), Jackson App. No. 653, unreported.

Here, the record affirmatively indicates that the trial court erroneously relied upon evidence which was not properly introduced in the case. Moreover, it placed special emphasis on the improperly considered evidence in its judgment entry which determined that

appellant was not entitled to equitable relief. Although other evidence properly introduced at trial would have supported the trial court's ultimate conclusion, see our discussion and disposition of appellant's second assignment of error, infra, we may not presume that the erroneous taking of judicial notice of evidence was harmless, i.e., that the trial court in exercising its discretion without the improper evidence necessarily would have reached the same conclusion. Cf., e.g., Spencer v. Spencer (April 29, 1991), Clark App. No. 2724, unreported (trial court's factual error not harmless although, without the error it would have been within its discretion to reach the same judgment and where the record affirmatively indicated such factual error). Appellant's first assignment of error is sustained.

Appellant's second assignment of

error asserts that the trial court erred in denying him equitable relief. The trial court determined that appellant was not entitled to equitable relief because he did not come to court with clean hands. Appellant contends that several facts manifested his intention not to relinquish control of the deed and that appellant obtained possession of the deed through no fault of his own. The essential elements of a valid gift inter vivos are: (1) an intention on the part of the donor to transfer the title and right of possession of the particular property to the donee then and there and (2) in pursuance of this intention, a delivery by the donor to the donee of the subject matter of the gift to the extent practicable or possible, considering its nature, with relinquishment of ownership, dominion and control over it. Bolles v. The Toledo Trust Co. (1936), 132 Ohio St. 21, first

paragraph of the syllabus; Dillon v. Dillon (Dec. 6, 1991), Pickaway App. No. 90CA33, unreported. The trial court essentially found that there was no delivery of the deed to appellee from appellant but that the deed was given to appellee's stepfather "to hold pending certain conditions." However, the trial court did not find the absence of any delivery significant because of appellant's deception regarding the Sciotoville property.

The cardinal maxim of equity jurisprudence, that he who comes into equity must come with clean hands, requires that the party seeking equitable relief not be guilty of reprehensible conduct with respect to the subject matter of the suit. Basil v. Vincello (1990), 50 Ohio St. 3d 185, 190; Ossenbeck v. Calhoun & Vine Realty Co. (Nov. 13, 1991), Hamilton App. No. C-900592,

unreported; Marinaro v. Major Indoor Soccer League (June 19, 1991), Summit App. No. 14877, unreported. One who has acted fraudulently or acted in bad faith is not entitled to equitable relief. Kettering v. Berger (1982), 4 Ohio App. 3d 254, 261-262.

Appellant admits that appellee has a superior legal right to the property, by virtue of appellee's recording of the deed, but claims that he has a superior equitable right to the property since none of the conditions for delivery by his escrow agent, Claude Springer, has ever been fulfilled, (and the trial court agreed in its findings of fact), and it would be unconscionable to give appellee and $82,000 windfall. However, the foregoing would not preclude the trial court from denying equitable relief based upon the clean hands doctrine. There was evidence introduced below that appellant,

while contemplating divorce, deceived his wife regarding the property and would have deceived the bankruptcy court had he filed for bankruptcy. Moreover, in a pretrial divorce deposition which he testified about below, appellant disclaimed any ownership interest in the property. Although the evidence introduced at trial could lead to different conclusions regarding the applicability of the clean hands doctrine,1 the trial court acted

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1 Appellant's testimony contradicted the foregoing as well by noting that his ex-wife was aware of his purchase of the Sciotoville property prior to the divorce (in other words, there was ultimately no deception of his wife at the time of the divorce). We emphasize that we do not condone appellee or her mother's actions in the case at bar. Moreover, we parenthetically agree with appellant's assertion on appeal that "[g]ood morals" are not necessarily coextensive with equitable considerations. However, although we might not have reached a similar conclusion regarding the clean hands doctrine's application to the case at bar even when considering the erroneously judicially noticed evidence if we were sitting as the trier of fact, the conflicting evidence appears to support a judgment in favor of either party in the case sub judice.

within its discretion to deny equitable relief to appellant where some evidence of reprehensible, fraudulent conduct on his part is apparent on the record. Therefore, without considering the error committed by the trial court as discussed under appellant's first assignment of error, supra, appellant's contentions as to a failure of delivery conditions and a windfall to appellee are meritless. Appellant's second assignment of error is overruled.

Appellant's third assignment of error asserts that the trial court erred in permitting Violet Cox-Fain to testify regarding privileged communications with appellant. Cox-Fain, a licensed independent social worker and professional counselor, testified over appellant's objection that during joint counseling sessions with the parties, appellant promised appellee that if she would

continue their relationship, he would purchase her a house and car.

Because the law of privilege is substantive in nature statutory provisions control. Evid. R. 501; State v. Smorgala (1990), 50 Ohio St. 3d 222. The pertinent statutory provision provides that a licensed or registered professional counselor or social worker shall not testify concerning a confidential communication made to him/her by his/her client in that relation or his/her advice to the client unless:

(a) * * *

(b) The client gives express consent to the testimony.

(c) * * *

(d) The client voluntarily testifies, in which case the school guidance counselor or person licensed or registered under Chapter 4757., of the Revised Code and rules adopted

under it may be compelled to testify on the same subject.

(e) * * *

(f) * * *

R.C. 2317.02 (G) (1) (emphasis added).

Although appellee contended below and asserts on appeal that Cox-Fain's testimony was not privileged because it was made in appellee's presence, this is not one of the listed statutory exceptions, although it is a valid statutory exception to the husband-wife privilege. See R.C. 2317.02(D). Additionally, we are not persuaded that a statement made in the presence of another "client" during joint counseling should necessarily be deprived of the benefit of this privilege where the statute does not so provide. Nevertheless, in the case at bar, appellant voluntarily testified that he had promised appellee a house only if they

got married, and Cox-Fain's testimony properly rebutted that by specifying that appellant's promises were conditioned only upon appellee resuming their relationship. See R.C. 2317.02(G) (1) (d). Moreover, any error in the admission of Cox-Fain's testimony was arguably harmless where the trial court's holding was not based upon such evidence but relied instead on appellant's alleged deception to invoke the clean hands doctrine. See In re Decker (1984), 20 Ohio App. 3d 203 (error in admission of privileged communications was harmless error where it could not have changed the result of the trial). In that we find no error in the admission of Cox-Fain's testimony where it related to the same subject as appellant's voluntary testimony, appellant's third assignment of error is overruled.

Appellant's fourth assignment of error asserts that the trial court erred

in failing to allow him to amend his complaint to add Claude and Marilyn Springer as defendants and to assert claims against them. Notice of the October 30, 1991, trial in the instant case was mailed on September 26, 1991. On September 27, 1991, appellant took the depositions of Claude and Marilyn Springer. On October 30, 1991 just prior to the commencement of the bench trial, appellant's counsel orally moved to amend the complaint to include the Springers as defendants. The trial court overruled the motion.

Civ. R. 15(A) provides in part:

(A) Amendments.

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and

> the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. * * *

A trial court's decision not to grant leave to amend a complaint will not be reversed absent an abuse of discretion. Wilmington Steel Products, Inc. v. Cleve. Elec. Illum. Co. (1991), 60 Ohio St. 3d 120; Solowitch v. Bennett (1982), 8 Ohio App. 3d 115. The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.

Wilmington, supra, at 122. In the instant case, although appellant took

depositions of the Springers on September 27, 1991, appellant waited over a month until the day of trial to orally request leave to amend the complaint, and then did not present any oral argument as to why such leave should be granted prior to the trial court's oral ruling. When a plaintiff fails to make a prima facie showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading. Id., at syllabus. Moreover, although appellant claims on appeal that he did not request a continuance of the trial based upon the deposition testimony of the Springers because he was "informed by the trial court that no continuances would be granted" and therefore he "had no choice but to wait until the morning of the trial to request that the Springers be added as parties," the record on appeal does not contain any evidence to support

these contentions. Accordingly, we find no abuse of discretion on the part of the trial court in overruling appellant's oral motion for leave to amend his complaint on the day of the trial. Appellant's fourth assignment of error is overruled.

In that we have sustained appellant's first assignment of error, the judgment is reversed and remanded to the trial court for a redetermination of appellant's complaint without considering the "evidence" it erroneously took judicial notice of concerning appellant's divorce trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Stephenson, P.J. Concurring:

I concur in the majority judgment an opinion, but write separately in order to express certain reservations. The court below opined that there were several reasons why appellant did not prevail on his claim and one of these was because "[h]e has no legal cause of action, for he is not in the chain of title." Obviously if appellant could not have maintained a claim for canceling the deed below, then any mistake by the court in considering the previous divorce action would have been harmless error.

The results of my own research tend to support the conclusion of the trial court on this issue. As a general rule, only a party to an instrument or one in privity therewith is entitled to maintain a suit to cancel or rescind that instrument. See cases cited in 12A Corpus

Juris Secundum (1980) 741, Cancellation of Instruments, Section 63a. Thus, the grantor in a deed is the proper party plaintiff in a suit to cancel such document. Id. at 764, Section 72. This would appear to be the law in Ohio. See Stevens v. McCoy (1899), 60 Ohio St. 540, 548 (right of action for recision of conveyance is personal unto grantor); also see Euclid Stores Co. v. Willard (App. 1929), 7 Ohio Law Abs. 633, 634 (right to maintain an action for recision and cancellation of an instrument is reserved unto the parties involved in the transaction).

Although appellant executed the real estate purchase contract (introduced below as plaintiff's exhibit 3), such contract merged into the subsequent deed. See 37 Robinwood Associates v. Health Industries, Inc. (1988), 47 Ohio App. 3d 156, 157-158; Medeiros v. Guardian Title & Guaranty

Agency (1978), 57 Ohio App. 2d 257, 259; Mayer v. Sumergrade (1960), 111 Ohio App. 237, 239. The deed at issue herein (introduced below as plaintiffs exhibit 1), reveals the Lauders as grantors and appellee as grantee. Thus, under the general rule discussed above, only these parties could maintain a cause of action to cancel or rescind the deed. Appellant was neither a party to the conveyance nor in privity with one who was and,therefore, stands outside that class of individuals generally recognized as being able to maintain such an action.

Some jurisdictions have carved out exceptions to this general rule and allow a person who was not a party to the instrument to sue so long as he had legal or equitable rights at stake. See cases cited in 13 American Jurisprudence 2d (1964) 537, Cancellation of Instruments, section 54. However, I find no authority

for the proposition that Ohio has embraced such an exception. Perhaps we should and perhaps we should not; there are logical arguments on both sides.

This is a nebulous area of the law and neither party has briefed this particular issue. I therefore do not base my decision on these grounds. Nevertheless, I am not fully persuaded that Ohio law allows for appellant to have maintained the action below. With this caveat in mind, I concur in the majority judgment and opinion.

Scioto App. No. 2021

(Blackburn v. Tudor)

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED to the trial court for further proceedings consistent with this opinion and that Appellant recover of Appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

Stephenson, P.J., Concurs with attached Concurring Opinion.

Abele, J., Concurs in Judgment and Opinion.

For the Court

/S/

William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE COURT OF APPEALS OF OHIO

FOURTH APPELLATE DISTRICT

SCIOTO COUNTY

Thomas L. Blackburn Plaintiff-Appellant

vs.

Rebecca L. Tudor Defendant-Appellee

Case No. 2021

PLAINTIFF'S NOTICE OF APPEAL

TO THE SUPREME COURT OF OHIO

Plaintiff-Appellant, Thomas L. Blackburn, hereby gives notice that he appeals the decision of the Fourth Appellate Court of Appeals dated September 25, 1992, to the Supreme Court of Ohio. This Notice is filed in accordance with Rule I(A) of the Rules of Practice of the Supreme Court of Ohio. Appellant intends this motion to be a motion to certify the record, as provided in Rule II, section 2, of the Rules of Practice of the Supreme Court of Ohio. Counsel for appellant

below was Gerlach, Gerlach, & Gerlach, and Mrs. Cynthia Gerlach. Counsel for appellee below was McCurdy, Johnson, Ruggiero, McKenize, and Bender, and Stanley C. Bender.

GERLACH, GERLACH & GERLACH

BY: /S/

Cynthia Koehler Gerlach

Attorney for Plaintiff

0029669

618 Chillicothe Street

Portsmouth, Ohio 45662

Phone 614/354-5297

PROOF OF SERVICE

This is to certify that on the 19th Day of October, 1992, and pursuant to Rule I(B) of the Rules of practice of the Supreme Court of Ohio, a true and correct copy of the foregoing Notice of Appeal was mailed, to Stanley C. Bender, Attorney for Defendant-Appellee, to his office at P.O. Box 950, Portsmouth, Ohio 45662.

GERLACH, GERLACH & GERLACH

BY_____/S/_____

Cynthia Koehler Gerlach

Attorney for Plaintiff

IN THE SUPREME COURT OF OHIO

AT

COLUMBUS, OHIO

THOMAS L. BLACKBURN,

Plaintiff-Appellant

Case No.92-2306

VS.

REBECCA TUDOR,

Defendant-Appellee

APPELLANT'S BRIEF IN SUPPORT OF

JURISDICTION

CYNTHIA KOEHLER GERLACH

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Portsmouth, Ohio 45662

Attorney for Plaintiff-Appellant

STANLEY C. BENDER

P.O. Box 950

Portsmouth, Ohio 45662

Attorney for Defendant-Appellee

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TABLE OF AUTHORITIES

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R.C. 2305.29	3, 5
5 O. Jur.3d, Appellate Review, Sections 702, 717, and 719	5
Strock v. Presnell, 38 O.S.3d 207,527 N.E.2d 1235 (1988);	5, 6
Slusher v. Oeder, 16 O.App.3d 432,476 N.E.2d 714, 16 OBR 503 (1984);	5, 6

INTRODUCTION

Plaintiff-Appellant, Thomas L. Blackburn, hereby presents his brief in support of jurisdiction, pursuant to Rule II, Section 4 of the Rules of Practice of the Supreme Court.

This is an appeal from a judgment rendered by the Court of Appeals for the Fourth Appellate District of Ohio. A copy of the judgment appears in the appendix hereof, as Exhibit A. The case originated in the Scioto County Court of Common Pleas. Assertion of jurisdiction over this case is of public interest because an opinion on the issues presented by this appeal will clarify the scope of R.C. 2305.29, which relates to breaches of promise to marry.

STATEMENT OF THE CASE AND OF THE FACTS

The parties were engaged to be married. Appellee, for no good cause, terminated the engagement. While engaged,

appellant purchased real property, to be given to appellee when they married. A deed was prepared conveying this property to appellee and placed with an escrow agent. After terminating the engagement, appellee surreptitiously recorded the deed. When appellant discovered this, he filed an action in the Scioto County Court of Common Pleas. The action came on for trial. Judgment was rendered favoring appellee. Appellant appealed to the Court of Appeals for the Fourth Appellate District.

The Appellate Court, on September 25, 1992, found that the trial judge had allowed improper evidence to be introduced into the case, vacated the judgment, and remanded the case to the trial court with instructions for the trial judge to consider the case without the improper evidence. On October 16, 1992, the trial judge entered a "Revised Judgment Entry",

reinstating his original decision. A copy of the judgment appears in the appendix hereof, as Exhibit B.

A motion to stay enforcement of the judgment is being filed contemporaneously with this Brief.

On October 19, 1992, appellant filed his notice of appeal to this Court, in accordance with Rule I(A) of the Rules of Practice of the Supreme Court of Ohio. A copy of the notice appears in the appendix hereof, as Exhibit C.

ARGUMENT

Proposition of Law No. 1:

When remand of a case from a Court of Appeals is based upon the trial court's use of improper evidence, the remand must be for a new trial. Remand should not be merely with directions to consider the case without the improper evidence.

Authorities cited in support of proposition of Law No. 1:

5 O.Jur.3d, Appellate Review, Sections 702,717, and 719;

Where there is a remand based upon the evidence presented at the trial, such remand normally contemplates a new trial. A remand which directs that the trial judge merely reconsider his opinion without the prejudicial evidence presents problems for all parties. A remand of this type does not afford appellant the full measure of relief contemplated by the Appellate Rules. Secondly, it forecloses any opportunity for either party to file a motion for recusal of the trial judge. Thirdly, it allows the trial judge's memory to supplant the actual record of the case. If a new trial is ordered by the appellate court, the parties may then agree to have the case submitted on the existing record, if those parties believe that such is in their best interest. See generally, 5 O.Jur.3d, Appellate Review,

Section 702, 717, and 719 and the cases cited therein.

Appellant urges this Court to assert its jurisdiction over this matter, in order to give its opinion on this issue of general importance to the public.

Proposition of Law No. 2:

Pursuant to R.C. 2305.29, a party may maintain an action to recover ownership of real property that was transferred to another in contemplation of marriage, where the engagement has been terminated.

Authorities cited in support of proposition of Law No. 2:

R.C. 2305.29:

Strock v. Presnell, 38 O.S.3d 207,527 N.E.2d 1235 (1988);

Slusher v. Oeder, 16 O.App.3d 432, 476 N.E.2d 714, 16 OBR 503 (1984);

Concurring opinion of Stephenson, J., Exhibit A of the appendix:

Under prior law, R.C. 2305.29 allowed recovery of such damages as loss of opportunity for companionship with others, embarrassment, and the like for breach of promise to marry. That is no longer true. Under present law, only tangible items transferred in contemplation of marriage may be recovered, when the engagement is terminated. There is little question regarding this, where personal property is involved. There exists, however, some question when the property sought to be recovered is real property instead of personalty, where there has been a transfer of ownership. See, generally, Strock v. Presnell, 38 O.S.3d 207, 527 N.E.2d 1235 (1988) and Slusher v. Oeder, 16 O.App.3d 432, 476 N.E.2d 714, 16 OBR 503 (1984). See, also the concurring opinion of Stephenson, J., Exhibit A of the appendix, which is hereby incorporated by reference. Appellant urges this Court

to assert its jurisdiction over this matter, in order to give its opinion on this issue of general importance to the public.

Some direction to the trial courts of Ohio, as to the application of the clean hands doctrine, in such causes of actions would also be helpful to a court in determining the validity of such claims.

WHEREFORE, for the reasons set forth above, appellant prays that this Court assert its jurisdiction over this matter.

GERLACH, GERLACH & GERLACH

BY /S/

Cynthia Koehler Gerlach

Attorney for Plaintiff

0029669

814 7th Street

Portsmouth, Ohio 45662

Phone 614/354-7755

CERTIFICATE OF SERVICE

This is to certify that, on November 18, 1992, and pursuant to Rule 1(B) of the Rules of Practice of the Supreme Court of Ohio, a true and correct copy of the Foregoing Notice of Appeal was mailed, postage prepaid to Mr. Stanley C. Bender, Attorney for Defendant, to his office at P.O. Box 950, Portsmouth, Ohio 45662

GERLACH, GERLACH & GERLACH

/S/

Cynthia Koehler Gerlach

Attorney for Plaintiff

APPENDIX AND ITS CONTENTS

Decision of the Court of Appeals for the Fourth Appellate District. **EXHIBIT A***

Revised Judgment of the Scioto County Court of Common Pleas **EXHIBIT B****

Notice of Appeal to the Ohio Supreme Court **EXHIBIT C*****

EXHIBIT A *	**PAGES 1A THRU 36A**
EXHIBIT B **	**PAGE 51A THRU 53A**
EXHIBIT C ***	**PAGES 37A THRU 39A**

IN THE COURT OF COMMON PLEAS

SCIOTO COUNTY, OHIO

THOMAS L. BLACKBURN, PLAINTIFF

-vs-

REBECCA L. TUDOR, DEFENDANT

CASE NO. 91-CI-136

REVISED JUDGMENT ENTRY

* * * * * * *

This cause comes on to be heard upon a Mandate from the Court of Appeals as follows:

"In that we have sustained Appellant's first assignment of error, the Judgment is reversed and remanded to the Trial Court for a redetermination of Appellant's Complaint without considering the evidence it took Judicial Notice of concerning Appellant's former Trial."

There was no intention of the Common Pleas Court, hearing the facts in this case, to rely upon any evidence in the Appellant's former Divorce Trial as it is

completely unnecessary to a Judgment in this case. An examination of Appellant's testimony in this case, on Cross Examination, reveals a pattern of deception both to his wife and also to his new girlfriend, who didn't know that he had two deeds made to the property. In this case he affirmed that he had previously under oath, denied any ownership in the property. It is also undisputed that the Appellant is not in the chain of title of the property. Therefore, I reaffirm my previous decision based solely upon the facts of this case as follows:

1. The Appellate was not entitled to legal relief not being in the chain of title (by his own choosing).

2. Under the facts of this case and by any existing maximum of equity, he did not have clean hands and was not entitled to equitable relief.

/S/

THOMAS W. MITCHELL, JUDGE

SITTING BY ASSIGNMENT

COMMON PLEAS COURT

SCIOTO COUNTY, OHIO

THE SUPREME COURT OF OHIO

1993 TERM

TO WIT: FEBRUARY 10, 1993

THOMAS L. BLACKBURN, APPELLANT

V.

REBECCA TUDOR, APPELLEE

CASE NO. 92-2306

E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Scioto County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS: Motion fee, $40.00 paid by Thomas Blackburn.

(Court of Appeals No. 2021)

/S/

THOMAS J. MOYER

Chief Justice

IN THE SUPREME COURT OF OHIO

AT

COLUMBUS, OHIO

THOMAS L. BLACKBURN, Petitioner-Appellant

VS.

REBECCA TUDOR, Respondent-Appellee

CASE NO. 92-2306

PETITIONER'S MOTION TO STAY

ENFORCEMENT OF JUDGMENT

AND

FOR VACATION OF SAME

Comes petitioner, by and through counsel, and moves this Court to enter an order staying enforcement of an order rendered by the Scioto County Court of Common Pleas, on or about October 16, 1992, pending a decision by this Court as to whether the order ought to be vacated. A short memorandum in support of this petition appears below.

MEMORANDUM IN SUPPORT OF PETITION

On September 25, 1992, the Court of Appeals for the Fourth Appellate District of Ohio rendered its Decision and Judgment Entry respecting this case. On October 16, 1992, prior to expiration of the thirty day period allowed to appeal to this Court, the trial judge entered a document captioned "Revised Judgment Entry" a copy of which is attached to this petition and made a part hereof, being designated as Exhibit A. On October 19, 1992, within the thirty day period to appeal, appellant filed his Notice of Appeal to the Ohio Supreme Court, with the clerk of the Court as required by Rule I(A) of the Rules of Practice of the Supreme Court of Ohio. A copy of this notice was sent to opposing counsel. An inspection of the above dates shows that the trial court's judgment was prematurely entered.

Notwithstanding said notice, however, appellee has placed the house, which is the subject of this controversy, on the open market, for sale to third parties. This act is clearly in violation of R.C. Sec. 2703.26. Appellant, however, has no adequate remedy at law. Filing a motion for relief from the judgment, pursuant to Civ.R.60(B), by its terms, will not toll the time in which to file a brief in support of jurisdiction, required by Rule 4(A) of the Rules of Practice of the Supreme Court of Ohio. Nor will such a motion keep the property from being sold, during the pendency of the motion. Appellant filed his brief contemporaneously with filing this petition.

It is the intention of R.C. Sec. 2703.26 to protect the public interest, and to forbid third parties from obtaining any interest in real property, while

ownership of the property is in dispute, as it is in this case. For this reason, granting of this petition is in the public interest.

WHEREFORE, for the reasons set forth above, appellant prays that this petition be sustained and that an order issue forbidding appellee to enforce the premature judgement until this Court has passed upon the Brief in Support of Jurisdiction, filed herein.

GERLACH, GERLACH & GERLACH

BY /S/

Cynthia Koehler Gerlach

Attorney for Plaintiff

0029669

814 7th Street

Portsmouth, Ohio 45662

Phone 614/354-7755

CERTIFICATE OF SERVICE

This is to certify that, on November 18, 1992, and pursuant to Rule 1(B) of the Rules of Practice of the Supreme Court of Ohio, a true and correct copy of the Foregoing Notice of Appeal was mailed, postage prepaid to Mr. Stanley C. Bender, Attorney for Defendant, to his office at P.O. Box 950, Portsmouth, Ohio 45662

GERLACH, GERLACH & GERLACH

/S/

Cynthia Koehler Gerlach

Attorney for Plaintiff

IN THE COURT OF COMMON PLEAS

SCIOTO COUNTY, OHIO

THOMAS L. BLACKBURN, PLAINTIFF

-vs-

REBECCA L. TUDOR, DEFENDANT

CASE NO. 91-CI-136

REVISED JUDGMENT ENTRY

* * * * * * *

This cause comes on to be heard upon a Mandate from the Court of Appeals as follows:

"In that we have sustained Appellant's first assignment of error, the Judgment is reversed and remanded to the Trial Court for a redetermination of Appellant's Complaint without considering the evidence it took Judicial Notice of concerning Appellant's former Trial."

There was no intention of the Common Pleas Court, hearing the facts in this case, to rely upon any evidence in the Appellant's former Divorce Trial as it is

completely unnecessary to a Judgment in this case. An examination of Appellant's testimony in this case, on Cross Examination, reveals a pattern of deception both to his wife and also to his new girlfriend, who didn't know that he had two deeds made to the property. In this case he affirmed that he had previously under oath, denied any ownership in the property. It is also undisputed that the Appellant is not in the chain of title of the property. Therefore, I reaffirm my previous decision based solely upon the facts of this case as follows:

1. The Appellate was not entitled to legal relief not being in the chain of title (by his own choosing).

2. Under the facts of this case and by any existing maximum of equity, he did not have clean hands and was not entitled to equitable relief.

/S/

THOMAS W. MITCHELL, JUDGE

SITTING BY ASSIGNMENT

COMMON PLEAS COURT

SCIOTO COUNTY, OHIO

THE SUPREME COURT OF OHIO

1992 TERM

TO WIT: NOVEMBER 20, 1992

THOMAS BLACKBURN, APPELLANT,

-V.

REBECCA TUDOR, APPELLEE.

CASE NO. 92-2306

ENTRY

This cause is pending before the Court on the filing of a motion for an order directing the Court of Appeals for Scioto County to certify its record. Upon consideration of appellant's motion for stay,

IT IS ORDERED by the Court that said motion for stay be, and same is hereby, denied.

/S/

THOMAS J. MOYER

Chief Justice

IN THE SUPREME COURT OF OHIO

AT

COLUMBUS, OHIO

THOMAS L. BLACKBURN, Plaintiff-Appellant

VS.

REBECCA TUDOR, Defendant-Appellee

Case No. 92-2306

APELLANT'S MOTION FOR REHEARING EN BLANC

CYNTHIA KOEHLER GERLACH

814 Seventh Street

Portsmouth, Ohio 45662

Attorney for Plaintiff-Appellant

STANLEY C. BENDER

P.O. Box 950

Portsmouth, Ohio 45662

Attorney for Defendant-Appellee

Comes appellant, by and through counsel, and moves this Court grant a rehearing, pursuant to Rule IX of the Rules of Practice of the Supreme Court, on the decision to deny certification of the record in this case. Appellant further moves this Court that the hearing be an en blanc hearing. A memorandum in support of this motion appears below.

MEMORANDUM IN SUPPORT OF MOTION

The law in the area of recoverable damages, upon a breach of promise to marry, is not well developed in Ohio and is a subject of general public interest. The legislature's abrogation of the previous common law damages, by enacting R.C. 2305.29, has caused this ambiguity. Appellant's damages are clearly in this area. As was shown at the trial of this action appellant was not at fault in breaching the contract to marry; there was a promise to marry; and in contemplation

of that marriage, appellant purchased a $82,000.00 home . The deed to this home was not to be transferred to appellee, until after the marriage. His partial performance, in purchasing the house that is the subject matter of this action, takes this matter out of the purview of the Statue to Frauds. Appellant did not knowingly place appellee into a position where she could obtain ownership rights in the home, prior to the marriage. Appellee obtained the deed from an escrow agent, through nefarious means.

The decision not to order certification of the record in this case means that appellee will profit from her own wrongdoing. The decision means also that, contrary to the mandates of the Ohio Constitution, the Courts of Ohio are not open to this appellant, for redress of a legitimate and clear wrong. This Court should remedy this inequity. At the very

least, appellant's right to redress should be abrogated on the decision of all Justices of this Court.

WHEREFORE, for the reasons set forth above, appellant prays that this Court sustains this motion.

Respectfully submitted,

GERLACH, GERLACH & GERLACH

BY /S/
Cynthia Koehler Gerlach

Attorney for Plaintiff

0029669

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Phone 614/354-7755

CERTIFICATE OF SERVICE

This is to certify that, on February 26, 1993, and pursuant to the Rules of Practice of the Supreme Court of Ohio, a true and correct copy of the foregoing was mailed, postage prepaid to Mr. Stanley C. Bender, Attorney for Defendant, to his office at P.O. Box 950, Portsmouth, Ohio 45662

GERLACH, GERLACH & GERLACH

/S/
Cynthia Koehler Gerlach
Attorney for Plaintiff

THE SUPREME COURT OF OHIO

1993 TERM

TO WHIT: March 24, 1993

Thomas L. Blackburn, Appellant,

v.

Rebecca Tudor, Appellee.

CASE NO. 92-2306

REHEARING ENTRY

(SCIOTO COUNTY)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 2021)

/S/

THOMAS J. MOYER

Chief Justice